

No. 4209<sup>6</sup>5-1-II

COURT OF APPEALS  
DIVISION II

11 AUG 24 AM 11:50

STATE OF WASHINGTON  
BY cm

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

STATE OF WASHINGTON

V.

JEFFREY G. HUBBARD

---

BRIEF OF APPELLANT

---

Thomas E. Weaver  
WSBA #22488  
Attorney for Appellant

The Law Office of Thomas E. Weaver  
P.O. Box 1056  
Bremerton, WA 98337  
**(360) 792-9345**

## TABLE OF CONTENTS

A. Assignment of Error.....	1
B. Statement of the Case.....	1
C. Argument .....	5
D. Conclusion .....	7

## TABLE OF AUTHORITY

### CASES

<u>Bullcoming v. New Mexico</u> , __ U.S. __, 131 S. Ct. 2705, 2718, __ L. Ed. 2d __ (2011).....	6
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed. 2d 177 (2004).....	1, 3, 5
<u>Davis v. Washington</u> , 547 U.S. 813, 126 S. Ct. 2266, 165 L.Ed. 2d 224 (2006).....	5
<u>Melendez-Diaz v. Massachusetts</u> , 557 U.S. __, 129 S. Ct. 2527, 174 L.Ed. 2d 314 (2009).....	5, 6
<u>Michigan v. Bryant</u> , 562 U.S. __ (2010), 131 S. Ct. 1143, 1155, __ L. Ed. 2d __ (2011).....	6
<u>State v. Dash</u> , __ Wn. App. __ (decided August 8, 2011).....	6
<u>State v. Jasper</u> , 158 Wn. App. 518, 245 P.3d 288 (2010), 170 Wash.2d 1025 (2011).....	6

A. Assignment of Error

Assignment of Error

The trial court erred by admitting Exhibit 1.

Issue Pertaining Assignment of Error

Exhibit 1, a clerk's minute from an earlier unrelated cause number, included a notation that Mr. Hubbard was served with a copy of the no contact order. Did the trial court err by concluding the notation was not testimonial within the meaning of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)?

B. Statement of Facts

Jeffrey Hubbard was charged by Amended Information on Kitsap cause number 10-1-00907-6 with felony violation of a court [no contact] order and driving while license revoked in the first degree. CP, 12. The State's theory for the felony was that Mr. Hubbard had been twice previously convicted of violating no contact orders. His case initially proceeded to trial by jury and a jury was empanelled. CP, 25. Immediately after the jury was sworn, the State requested that sixteen exhibits be marked and offered exhibits 1 through 11 for admission. CP, 33, 25, RP, 17. (Exhibit 11 was later withdrawn by the State. RP, 49.) There was lengthy argument about the proposed exhibits. During the argument, the State also marked exhibits 6A and 8A, which were redacted

copies of exhibits 6 and 8 respectively. CP, 27, 33. However, these exhibits were apparently not offered for admission. CP, 33. The court ultimately admitted exhibits 1 through 10 over defense objection. CP, 27-28.

Following the court's decision to admit exhibits 1 through 10, the defendant elected to proceed by way of a stipulated facts trial. CP, 29. The court convicted him as charged. CP, 32, 34. Mr. Hubbard appeals. CP, 46.

The crux of this case pertains to the trial court's decision to admit exhibits 1 through 10. Exhibits 1 through 5 are the information, amended information, no contact order, sentencing minute, and judgment and sentence on Kitsap cause number 06-1-00639-7. Exhibits 6 through 10 are the criminal complaints and judgment and sentence on Kitsap District numbers 10699826, 106998230, and 106998233. All of the documents were certified by either the Kitsap County Clerk's Office or the Kitsap County District Court Clerk's Office. Ex. 1-10. The victim on all cause numbers was the same: Marie Perras. The defense objected on foundational, relevance, ER 404(b), hearsay, and Confrontation Clause grounds. RP, 9, 21, 26.

Exhibit 1 is the clerk's minutes from 06-1-00639-7. RP, 18. The charges on this cause number were second degree assault and violation of

a court order. RP, 22. There is box checked by a clerk on the minutes indicating that Mr. Hubbard received a copy of the no contact order on that cause number. RP, 18. Mr. Hubbard argued that the checked box was testimonial and violated his right to confront witnesses pursuant to *Crawford v. Washington, infra*. RP, 33.

Exhibits 4 and 5, 7, 9 and 10 are the charging documents from 06-1-00639-7 and 10699826, 106998230, and 106998233. Attached to the charging documents are probable cause statements. According to the State's offer of proof, the State intended to call Ms. Perras to testify that she is the Marie Perras identified in the probable cause statements and that the Jeffrey Hubbard named in the probable cause statement was the same Jeffrey Hubbard on trial in cause number 10-1-00907-6. RP, 20. The State also intended to call Kitsap County Deputy Clerk Margaret Rogers who would testify about how cause numbers are generated and that each cause number is unique to each incident. RP, 20. As the State put it, they intended to "connect the dots" between the defendants arrest on each cause number, the issuance of a no contact order, and the defendants ultimate conviction for at least two violations of court orders. RP, 29.

There was some discussion of redaction of the exhibits. The State's position was that redaction may be permissible with the consent or stipulation of the defendant, but absent a stipulation, the documents were

self authenticating public records and should be admitted in an unredacted form. RP, 30.

There was also discussion of fingerprinting. RP, 31. Normally, fingerprints are used to tie a judgment and sentence to a particular defendant. However, the State objected to the implication that it was required to utilize fingerprints in every case to prove identity. RP, 44.

The court ruled that the exhibits were certified court records and admissible pursuant to RCW 5.44.010 without further authentication. RP, 53. The court also admitted the documents pursuant to ER 803(a)(22) and (23). RP, 54. To the extent that the documents implicated ER 404(b), the court held that the documents were being admitted to prove identity, which is one of the exceptions to ER 404(b). RP, 54-55. The court also weighed the probative value against the prejudicial value and found that although the documents are highly prejudicial, the probative value was also high and that the probative value outweighed the prejudicial value. RP, 55. The State was not required to rely on fingerprints to prove its case, although fingerprints would be more customary. RP, 56.

As to Exhibit 1, the court concluded that the checked box indicating Mr. Hubbard received a copy of the no contact order was not testimonial. RP, 57.

Finally, the court suggested that a limiting instruction might be appropriate. RP, 59. After some discussion about this and possible stipulations by the defense, Mr. Hubbard decided to waive his right to a jury determination and do a stipulated facts trial. RP, 70. The defense made explicit that the stipulated facts trial was in recognition that the trial court had admitted exhibits 1 through 10 over defense objection. RP, 70-71, 73.

C. Argument

The seminal case of *Crawford v. Washington* reframed the way the Confrontation Clause is interpreted and held that evidence in a criminal case may not be admitted if it is “testimonial” and the declarant does not testify in open court subject to cross-examination by the defendant. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The Court explicitly declined to define the word “testimonial,” saying that the term would have to be defined in later cases. Since *Crawford*, the Court has reviewed a variety of situations to determine whether the admitted evidence was “testimonial.” See *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (911 call of domestic violence victim); *Melendez-Diaz v. Massachusetts*, 557 U.S. \_\_\_, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (lab report in drug



case); *Michigan v. Bryant*, 562 U.S. \_\_\_, 131 S. Ct. 1143, 1155, \_\_\_ L. Ed. 2d \_\_\_ (2011) (description of assailant given at the crime scene by murder victim); *Bullcoming v. New Mexico*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2705, 2718, \_\_\_ L. Ed. 2d \_\_\_ (2011) (supervisor of lab technician who performed lab analysis).

Reviewing these cases, this Court has recently said that the Confrontation Clause jurisprudence is a “fast-evolving area of the law.” *State v. Dash*, \_\_\_ Wn. App. \_\_\_ (decided August 8, 2011). This Court said, “[The Supreme] Court has more recently suggested that the proper focus is not on whether the statement is hearsay but, rather, whether the statement is offered ‘against’ the defendant to establish or prove a past event relevant to the criminal prosecution.” *Dash* at \_\_\_ (Citations omitted.) In support of this proposition, the Court quoted the Supreme Court as follows:

The text of the Sixth Amendment contemplates two classes of witnesses -- those against the defendant and those in his favor. The prosecution must produce the former; the defendant may call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.

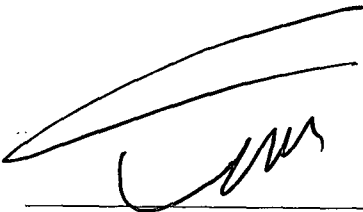
*Dash* at \_\_\_, citing *Melendez-Diaz*, 129 S. Ct. at 2533-34. Accord *State v. Jasper*, 158 Wn.App. 518, 245 P.3d 288 (2010), review granted, 170 Wash.2d 1025 (2011).

The issue is whether a clerk's minute notation that the no contact order was served on the defendant is "testimonial." The question must be answered in the affirmative. The notation was offered against Mr. Hubbard "to establish or prove a past event relevant to" his prosecution for violating a court order. The witness (the deputy clerk who made the notation) was not called by the prosecution and was not helpful to the defense. And as there is no third category of witnesses, the Confrontation Clause was violated. The trial court erred by admitted Exhibit 1, including the checked box, without affording Mr. Hubbard an opportunity to cross-examine the declarant.

D. Conclusion

This Court should reverse and remand for a new trial.

DATED THIS 22<sup>nd</sup> day of August, 2011.

A handwritten signature in black ink, appearing to read 'Thomas E. Weaver', is written over a horizontal line.

Thomas E. Weaver  
WSBA# 22488  
Attorney for the Appellant

FILED  
COURT OF APPEALS  
DIVISION II

11 AUG 24 AM 11:50

STATE OF WASHINGTON  
BY cm  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, ) Case No.: 10-1-00907-6  
Respondent, ) Court of Appeals No.: 42096-1-II  
vs. ) AFFIDAVIT OF SERVICE  
JEFFREY G. HUBBARD, )  
Defendant. )

STATE OF WASHINGTON )  
COUNTY OF KITSAP )

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

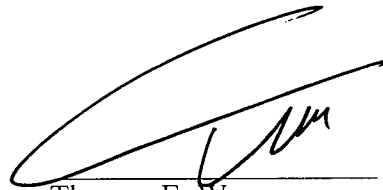
I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action,  
and competent to be a witness.

On August 23, 2011, I sent an original, postage prepaid, and a copy of the BRIEF OF  
APPELLANT, to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite  
300, Tacoma, WA 98402.

1 On August 23, 2011, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to  
2 the Kitsap County Prosecutor's Office, 614 Division St. MSC 35, Port Orchard, WA 98366-  
3 4683.

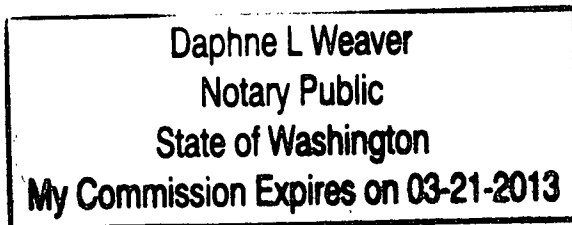
4 On August 23, 2011, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT to  
5 LEGAL MAIL, Mr. Jeffrey G. Hubbard, DOC #897704, Washington Corrections Center, P.O.  
6 Box 900, Shelton, WA 98584.

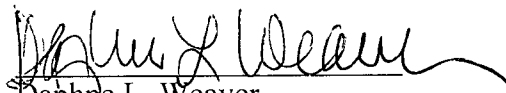
7 Dated this 23<sup>rd</sup> day of August, 2011.



Thomas E. Weaver  
WSBA #22488  
Attorney for Defendant

11 SUBSCRIBED AND SWORN to before me this 23<sup>rd</sup> day of August, 2011.



13   
14 Daphne L. Weaver  
15 NOTARY PUBLIC in and for  
16 the State of Washington.  
17 My commission expires: 03-21-2013